NO. 56174-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

TONY VARNEY, et al.,

Plaintiffs/Respondents/ Cross-Appellants,

v.

CITY OF TACOMA

Defendant/Appellant/Cross-Respondents.

CITY OF TACOMA'S REPLY BRIEF

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Neither the first party insured duty of good faith[1] nor general civil fraud principles operate to pierce the City's attorney-client privilege or work product protections. Central to Plaintiffs Tony and Geralyn Varneys' ("Plaintiffs")[2] Response ("Response Br.") is their demand for unfettered access to Defendant City of Tacoma's ("City") privileged documents based on unsupported allegations that these documents contain evidence of bad faith amounting to civil fraud and, presumably, abuse of process and that the same entitles Plaintiffs to pierce the fundamental protections provided by the doctrines of attorney-client privilege and work product.

In pursuing this course of action and appeal, Plaintiffs rely on the following unsupported string of assumptions: first, that

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[1] See Cedell v. Farmers Ins. Co. of Wash., 176 Wn.2d 686, 295 P.3d 239 (2013).

[2] Geralyn Varney was not a party to the underlying Industrial Insurance claim. Therefore, for purposes of the Industrial Insurance litigation, Tony Varney is referenced as "Varney." Later use of the term "Plaintiffs" in this brief is intended to include both Respondents/Cross-Appellants Tony and Geralyn Varney.

the City was an "insurer" and Varney was an "insured"; second, as an "insurer", the City is subject to Plaintiffs' allegation that the City committed bad faith amounting to civil fraud; third, that the existence of bad faith amounting to civil fraud provides grounds to pierce the protections provided by attorney-client privilege and/or the work-product doctrine and thereby access the City's privileged or otherwise protected documents.

Plaintiffs are silent in their Response on issues related City's Issue No. 2 (Assignment of Error No. 5 -Internal Communications are Protected Attorney-Client Privilege) and City Issue No. 3 (Assignment of Error No. 6 - Common Interest Privilege). As such, Plaintiffs have abandoned their opposition to these issues.

Finally, Plaintiffs' requests for attorneys' fees for this appeal is not supported by the law.

I. Plaintiffs Misstate the Record on Appeal.

Plaintiffs erroneously state that the trial court found"[c]ertain communications were in furtherance of civil

fraud (abuse of process) and therefore privilege was stricken." Response Br., p. 44-45. The trial court made no such finding. Neither did the trial court conclude that "privilege was stricken." What the trial court *did* do was order release of protected information because it was "relevant" or "could lead to the discovery of admissible evidence in support of Plaintiff's tortious Abuse of Process claims…." Clerk's Papers (CP) 1434, 1528. In so ordering, the trial court clearly—and erroneously—used the CR 26 discovery analysis.

II. Cedell v. Farmers Ins. Co. of Wash. Does Not Apply.

A. Plaintiffs Fail to Provide Applicable Authority.

To the degree that the trial court relied on Plaintiffs' arguments that Cedell v. Farmers Ins. Co. of Wash., 176 Wn.2d 686, 295 P.3d 239 (2013), applies, the trial court erred. Further, none of the authority cited in Plaintiffs' Response in support of their argument that the City was an "insurer" is compelling. This is because authority clearly holds that the City was not an insurer and Varney was not an insured and, as such, Cedell v. Farmers

Ins. Co. of Wash., 176 Wn.2d 686, 295 P.3d 239 (2013), does not apply to provide the presumption of no attorney-client privilege that Plaintiffs demand.

In the present appeal, the procedural facts in the record confirm the City and Varney were in an adversarial litigation posture since the inception of Varney's Title 51 RCW industrial insurance claim in July of 2009.[3] The record does not support Plaintiffs' argument that the City and Varney were ever in a quasi-fiduciary or contractual relationship with the extra duty of good faith those relationships require. More specifically, the City was not an "insurer" and, therefore, Varney was not an "insured" in the context of Title 51 RCW workers' compensation litigation—which is a necessary condition precedent prior to application of rebuttable presumption provided by Cedell v. Farmers Ins. Co. of Wash., 176 Wn.2d 686, 295 P.3d 239 (2013).

[3] "Title 51 RCW governs claims for industrial insurance and workers compensation." Cordova v. City of Seattle, 20 Wn. App. 2d 139, 145, 501 P.3d 601 (2021).

Cedell v. Farmers Ins. Co. of Wash. provides for a rebuttable presumption of no attorney-client privilege in the *insurer's claim adjusting process* when the party seeking to pierce the privilege is in *first-party insured* status with an insurer asserting privilege or work product protections. (Emphasis added.) The ability to pierce attorney-client privilege is available in the context of a *first-party insured* bad faith claims against insurers because of the "unique considerations" related to the "quasi-fiduciary" contractual relationship the exists between an insurance company and a first-party insured. See Cedell v. Farmers Ins. Co. of Wash., 176 Wn.2d at 696-698. As such, Cedell is limited to the specific and "unique" circumstances where the insurer has a quasi-fiduciary, contractual relationship with the *first party insured* pursuant to their *insurance contract*. As discussed below, evidence in the record before the trial court clearly shows that the relationship between Varney and the City was adversarial and, therefore, neither quasi-fiduciary nor contractual.

Consistent with above, the law holds Title 51 RCW workers compensation is **not the equivalent of insurance**. In 1993, the Washington State Supreme Court stated that Title 51 RCW "workers' compensation fund is not considered the equivalent of insurance." Wash. Ins. Guar. Ass'n ex rel. Bloch v. Dept't of Labor & Indus., 122 Wn.2d 527, 533, 859 P.2d 592 (1993)(citing Stertz v. Industrial Ins. Comm'n, 91 Wash. 588, 158 P. 236 (1916); Favor v. Department of Labor & Indus., 53 Wash.2d 698, 703, 336 P.2d 382 (1959)). "RCW Title 51 is an exercise of the police power that uses public funds and administers government functions under a statute whose terms and requirements are nonnegotiable." Wash. Ins. Guar. Ass'n ex rel. Bloch v. Dep't of Labor & Indus., 122 Wn.2d at 533 (quoting Shum v. Department of Labor & Indus., 63 Wash. App. 405, 411, 819 P.2d 399 (1991)); see also, RCW 51.04.010. In performing this function, the Department of Labor & Industries ("Department") "is not engaged in making…[insurance] contracts." Wash. Ins. Guar. Ass'n ex rel. Bloch v. Dep't of

Labor & Indus., 122 Wn.2d at 533. Further, the "employer payments to the State fund are often referred to as premiums [but] RCW 51.08.015 provides that the term 'premium' should be construed to mean taxes." Id.[4] Title 51 RCW provides two ways by which employers can provide this mandated workers' compensation: participation in the state fund or qualification as a self-insurer. RCW 51.14.010. There is no authority indicating employers who participate in the fund and employers who qualify to be self-insured should be treated differently.

Further highlighting the distinct differences between insurance at issue in Cedell and the Title 51 RCW workers compensation framework relevant to this appeal is the case of Durant v. State Farm Mut. Auto. Ins. Co., 191 Wn.2d 1, 17; 419 P.3d 400 (2018). In Durant, the Washington Supreme Court pushed back when insurer State Farm argued that Title 51 RCW terms applied in a dispute under Title 48 RCW. "Washington's

[4] See RCW 51.08.015.

public system of workers compensation is not the equivalent of insurance." Durant v. State Farm Mut. Auto. Ins. Co., 191 Wn.2d 1, 17; 419 P.3d 400 (2018) (citing Wash. Ins. Guar. Ass'n v Dep't of Labor & Indus., 122 Wn.2d. 527, 532-22, 859 P.2d 592 (1993)).The Court explained that "the purposes in regulating medical services provided to injured workers under Title 51 RCW and in regulating medical services an insurer is required to pay in PIP [personal injury protection] coverage under Title 48 are distinct." Durant at 17. "The IIA[5] was the product of a 'grand compromise' in 1911, in which injured workers are ensured a swift, no-fault compensation system for injuries on the job and employers received immunity from civil suits by workers." Id. (quoting Birklid v. The Boeing Co., 127 Wn.2d 853, 859, 904 P.2d 278 (1995)). "As a result, 'employees may receive less than full tort damages in exchange for the expense and uncertainty of

[5] Industrial Insurance Act (IIA), or Title 51 RCW. Durant at 17.

litigation." Id. (quoting Minton v. Ralston Purina Co., 146 Wn.2d 385, 390, 47 P.3d 556 (2002)).

Finally, Title 48 RCW - Insurance includes within its scope only "insurance and insurance transactions in this state". RCW 48.01.020. Within Title 48, insurance is defined as "a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies." RCW 48.01.040. As mentioned above, there was, and is, no insurance contract between the City and Varney.

Second, the City was **not an "insurer"** and, consistent with this, Varney was **not an "insured**". Even assuming arguendo that Title 48 RCW - Insurance is applicable to workers' compensation claims, there are no facts in the record supporting Plaintiffs' assertions that the City met the definition of "insurer" in RCW 48.01.050 ("'Insurer' as used in this code includes every person engaged in the business of making contracts of insurance…"). Even, assuming for the sake of argument, that Title 48 RCW has any applicability to the present appeal, the

Washington State Insurance Commissioner Unfair Claims Settlement Practices Regulation defines "insurer", for Title 48 RCW purposes, as follows:

> "any individual, corporation, association, partnership, reciprocal exchange, interinsurer, fraternal mutual insurer, fraternal mutual life insurer, and any other legal entity *engaged in the business of insurance, authorized or licensed to issue or who issues any insurance policy or insurance contract in this state*."

WAC §284-30-320(10). (Emphasis added.)

There is no evidence in the record that the City was, while litigating Varney's claim before the Board, "engaged in the business of making contracts of insurance". Likewise, there is no evidence in the record that the City was "engaged in the business of insurance", or "authorized or licensed to [issue]…any insurance police or insurance contract…." Id. As such, even if Title 48 RCW was applicable to this case—which it is not—the City still did not meet the definition of an insurer.

Plaintiffs cite to Taylor v. Redmond, 89 Wn.2d 315, 571 P.2d 1388 (1977) and argue that, "in an action under RCW 41.26.281 (firefighter right to sue) the City is liable as if it were a private corporation, the *government* exclusion in RCW 48.010.150's definition of "insurer" does not apply." Response Br. 37. This is a head-scratching argument. Taylor v. Redmond is a 1977 Washington State Supreme Court decision that looked at what the parties argued was lack of clarity regarding whether a city police officer could receive Title 51 RCW benefits and also sue his employer for negligence under Title 41 RCW – the Washington State Law Enforcement Officers' and Fire Fighters Retirement System Act (LEOFF)—which the Court answered in the affirmative. There is no mention of Title 48 RCW, no analysis relating to the definition of "insurer" and no helpful discussion of statutory construction.

Other authority cited by Plaintiffs is similarly unhelpful. None of the cited cases support finding that the City was an insurer. See St. Paul Fire & Marine Ins. Co. v. Onvia, Inc., 165

Wn.2d 122, 196 P.3d 664 (2008)(bad faith suit arising out of a third-party claim against insurance company decided on the basis of Title 48 RCW and Title 284-30 WAC); Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc., 161 Wn.2d 903, 169 P.3d 1 (2007)(third-party insurance declarative action where insurance company sought a declaration of coverage obligation to an insured where the insurance company was defending the insured under a reservation of rights); Jones v. Dep't of Labor & Indus., 17 Wn. App. 2d 437, 486 P.3d 949 (2021)(employer appealed Department's assessment of back taxes and penalties assessed after employer failed to pay required industrial insurance premiums for its employees).

Absent legal authority showing Title 51 RCW workers compensation is the equivalent of insurance and that the City was an insurer with Varney its insured, Plaintiffs' effort to weaponize the rebuttable presumption in Cedell is legally unsupportable. As such, the trial court's order directing release of privileged documents, to the degree it rests on Cedell, is error.

Further, Plaintiffs' attempts to appeal to the Court's sense of equity and fairness[6] ignores the protective and/or remedial mechanisms built into Title 51 RCW. See RCW 51.14.080 (Withdrawal of certification-Grounds.), .090 (Withdrawal of certification, corrective action upon employees' petition.), .095 (Corrective action-Appeal.) .100 (Notice of compliance to be posted-Penalty.); .110 (Employer's duty to maintain records, furnish information); .120 (Copy of claim file—Notice of protest or appeal-Medical report.), .130 (Request for claim resolution-Time.); .140 (Violations of disclosure or request for resolution - Order by director.), .340 (Ombuds office – Powers and duties); .350 (Ombuds Office-Referral procedures) and RCW 51.52 et seq. - Appeals.

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[6] "The City…does not get a pass to engage in bad faith claims handling of Mr. Varney's industrial insurance claim merely because this is an insurance claim under Title 51 RCW." Response Br. P. 31

B. Civil Fraud Exception and Abuse of Process Claims Cannot Co-Exist and are Irreconcilable.

Application of the Cedell civil fraud exception to attorney-client privilege is irreconcilable with Plaintiffs' abuse of process claim, rendering both factually unviable. This is because the relationship between the parties required for application of the Cedell civil fraud exception (a quasi-fiduciary relationship)is wholly opposite to the relationship required in an abuse of process claim (adversarial).

As discussed above, for Cedell to apply, along with its rebuttable presumption of no attorney-client privilege, Varney must have been in first-party insured status vis a vis the City. Only if Varney was a first party insured did an insurer (the City, for sake of argument) have a *quasi-fiduciary, contractual relationship* with him—with the concomitant duty of good faith. See St. Paul Fire & Marine Ins. Co. v. Onvia, Inc., 165 Wn.2d 122, 196 P.3d 664 (2008). Good faith means "more than 'honesty and lawfulness of purpose'. . . [i]t implies a 'broad obligation of

fair dealing" and a responsibility to give 'equal consideration' to the insured's interests." St. Paul Fire & Marine Ins. Co. v. Onvia, Inc., 165 Wn.2d at 129.

In direct juxtaposition, Plaintiffs' abuse of process claim—covering the exact same time span as Varney was litigating his Title 51 RCW claims-- requires the existence of an *adversarial relationship* created by initiation of the process. See Batten v. Abrams, 28 Wn. App. 737, 748, 626 P.2d 984 (1981)("The tort goes to use of the initial process once it has been issued for an end for which it was not designed."); see also, Hough v. Stockbridge, 152 Wn. App. 328, 216 P.3d 1077 (2009)(Abuse of process relates to acts occurring after filing suit and, therefore, jury instructions correctly stated the law.); Restatement 2d of Torts, § 682.

As such, Plaintiffs' claim that the City had a quasi-fiduciary duty to Varney cannot, by definition, co-exist with the adversarial posture the parties have been in since 2009. As a result, Plaintiffs' position on access to attorney client privileged

material under Cedell and his claim of abuse of process by the City cannot co-exist and reveals fatal flaws in both positions taken by Plaintiffs.

III. Trial Court Erred in Ordering Release of Protected Information Under General Fraud Exception or CR 26(b)(4).

A. The General Civil Fraud Exception to Attorney Client Privilege is Inapplicable in This Case and Trial Court Failed to Follow Required Two-Step Procedure.

Plaintiffs' Response provides no legally compelling reason to apply the fraud exception even once Cedell is set aside. In matters not implicating Cedell's rebuttable presumption regarding attorney-client privilege (i.e., first party insureds), there is no initial presumption. As such, the first step requires the Plaintiffs to show the trial court that "a factual basis adequate to support a good faith belief by a reasonable person that wrongful conduct sufficient to invoke the crime or fraud exception to the privilege has occurred." Whetstone v. Olson, 46 Wn. App. 308, 311-312, 732 P.2d 159 (1986); see also, Stephens v. Gillispie, 126 Wn. App. 375, 382, 108 P.3d 1230 (2005)(Plaintiff made an

"adequate showing of facts to invoke the fraud exception to the attorney-client privilege" in case involving disagreement over stipulation and order of dismissal.). "[A]n in-camera review is not warranted whenever a bare allegation of fraud is asserted." Id. at 311. Further, "[g]ood faith consultations with attorneys by clients who are uncertain about the legal implications of a proposed course of conduct are entitled to the protection of the privilege even if that action should later be held improper." Whetstone v. Olson, 46 Wn. App. at 310. Only after Plaintiffs make this showing does the trial court engage in the second step and conduct an in-camera inspection of the privileged materials. Id.

In looking at whether Plaintiffs can meet their burden, it is helpful to look at what Plaintiffs allege amounts to fraudulent conduct by the City. In their Response, Plaintiffs' claim the following: (1) "[t]he City repeatedly engaged in legal

maneuverings for which there was no lawful process";[7] and (2) "[t]he City misrepresented and mislead the Department about the nature of Mr. Plaintiffs' claim and the jury's verdict.[8] Both arguments are exactly the type of "bare allegation of fraud" insufficient to initiate an in-camera review, much less a finding sufficient to warrant piercing attorney-client privilege. See Whetstone v. Olson, 46 Wn. App. 308, 311 (1986).

To the contrary, the record before the trial court and before this Court contain no evidence the City exercised its administrative and statutory rights outside the legal framework of Title 51 RCW, Title 4 RCW or the Washington State Court

[7] Respondent's Brief, pp. 38-42.

[8] Respondent's Br. p. 42 (Though the details of how the City allegedly did this are not clear in the record, particularly since the record throughout reflects the Department was involved in all Title 51 RCW administrative proceedings and, at the very least, the Department was represented at the Pierce County Superior Court Cause No. 16-2-04732-2 jury trial and verdict. CP 140, 241, 410, 587, 608, 614- 616, 615, 619, 635).

Rules: Superior Court Civil Rules.[9] Instead, and as detailed in the City's Opening Brief, the record indicates the exact opposite: every time Varney raised the issue of malfeasance on the part of the City, the Board of Industrial Insurance Appeals ("Board") and the Pierce County Superior Court concluded--on more than one occasion before Plaintiffs filed the present lawsuit--that the City's litigation efforts were based on "genuine doubt" as to the issues and City did not "unreasonably delay" payments to Varney. CP 392-397,405-410, 644-652, 676-681;[10] Opening Br. p. 14-19.

[9] To the degree Plaintiffs rely on Board administrative law judge (ALJ) proposed decisions and orders, this is foreclosed by Stratton v. Dep't of Labor & Indus., 1 Wn. App. 77, 79, 459 P.2d 651 (1969) (references to, and consideration of, Board proposed decisions are improper as they "are not the [final] decisions and orders of the Board."); see also, Clark Cty. v. McManus, 188 Wn. App. 228, 354 P.3d 868 (2015)(on the issue of whether the Board was correct, preliminary determinations by the administrative law judge is immaterial).

[10] CP 644-652 (Board Decision and Order dated November 9, 2015); CP 405-410 (Board Decision and Order dated January 15, 2016); CP 392-397 and CP 676-681 (duplicate) (Pierce County Superior Court Cause No. 16-2-04732-2 – Findings of Fact and Conclusions of Law and Judgment dated August 21, 2017).

In conclusion, the record shows the trial court failed to conduct the threshold analysis before permitting in camera review of the City's protected information under the process required for the general civil fraud exception. And, if the trial court had engaged in the threshold analysis, the record shows that Plaintiffs would not have been able to provide sufficient evidence suggesting anything but "bare assertions" of fraud unsupported by evidence.

B. Insufficient Evidence Supporting Application of CR 26(b)(4) to Order Release of Documents Protected by Work Product Doctrine.

To the degree the trial court relied on CR 26(b)(4) in ordering disclosure of protected information to the Plaintiffs, the trial court erred. The trial court erred because (1) Plaintiffs made no showing that the protected information was relevant to Plaintiffs' abuse of process claim and because (2) Plaintiffs made no showing of substantial need, to wit: Plaintiffs did not provide evidence of a substantial need coupled with an inability to obtain

the information related to their abuse of process via non-protected discovery.

To the extent Plaintiffs' repeated insistence that they "must have access" to the City's privileged or otherwise protected materials in order to have "a full and fair opportunity to prove their [abuse of process] claim" by showing "motive and/or intent" on the part of the City amounts to an argument to which CR 26(b)(4) applies, this should be rejected. Response Br. pp. 38, 44, 46. While Plaintiffs do not cite to it, and the trial court does not appear to address directly in the orders underlying this appeal, Plaintiffs appear to be arguing that they are entitled to protected information under CR 26(b)(4) (Trial Preparation: Materials).

CR 26(b)(4) states:

> (4) Trial Preparation: Materials. Subject to the provisions of subsection (b)(5) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including a party's attorney, consultant, surety, indemnitor, insurer, or agent) **only upon a showing that**

the party seeking discovery has substantial need of the materials in the preparation of such party's case and that the **party is unable without undue hardship to obtain the substantial equivalent of the materials by other means**. In ordering discovery of such materials when the **required showing has been made**, the court **shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation**.

Emphasis added.

Implicit in all discovery rules, including CR 26(b)(4), is that the information sought is relevant. CR 26(b)(1). Therefore, in reviewing whether protected work product should be released under CR 26(b)(4), the Court's first consideration should be whether the information sought is relevant. CR 26(b)(1). In this case, the information Plaintiffs demand access to is not relevant to his abuse of process claim.[11] This is because the evidence relevant to prove their abuse of process claim, to the degree it exists, is necessarily public.

[11] Which is the stated reason for wanting access to the City's privileged communications. Response Br. p. 43-46 (Issue No. 5).

As outlined previously, the elements of an abuse of process claim are: "(1) existence of an ulterior purpose—to accomplish an objective not within the proper scope of the process and (2) an act in the use of legal process not proper in the regular prosecution of the proceedings not within the proper scope of the process." Sea-Pac Co. v. United Food & Commercial Workers Local Union 44, 103 Wn.2d 800, 805, 699 P.2d 217 (1985)(citing Fife v. Lee, 11 Wn. App. 21, 521 P.2d 964 (1974); see also, Restatement 2d of Torts, § 682. Initiation, or filing of a lawsuit, even if vexatious, will not support an abuse of process claim. Mason v. Mason, 19 Wn. App. 2d 803, 844, 497 P.3d 431 (2021); Saldivar v. Momah, 145 Wn. App. 365, 389, 186 P.3d 1117 (2008); Batten v. Abrams, 28 Wn. App. 737, 749, 626 P.2d 984 (1981). "[A]buse of process claims require more than a defendant's ill intent…." Maytown Sand & Gravel, LLC v. Thurston Cty., 191 Wn.2d 392, 439, 423 P.3d 223 (2018). An existence of an ulterior motive, by itself, is insufficient to establish abuse of process. See Sea-Pac Co. v. United Food &

Commercial Workers Local Union 44, 103 Wn.2d at 805)(Court noted that "there must be an act after filing suit using legal process."); see also, State v. Hyder, 159 Wn. App. 234, 250, 244 P.3d 454 (2011)(It was not an abuse of process when law enforcement executed a warrant for Hyder's therapist records rather than use other mechanisms to obtain the records that would have required notice to Hyder; the Court stated that there was no evidence law enforcement was precluded from utilizing the warrant option.); Hough v. Stockbridge, 152 Wn. App. 328, 345, 216 P.3d 1077 (2009)(Need an act after initiating suit for abuse of process claim.), Saldivar v. Momah, 145 Wn. App. 365, 388, 186 P.3d 1117 (2008)(Defendant Dr. Momah's claims that plaintiffs filed suit to make sure he never practiced medicine again and served process upon his brother—who was facing criminal charges—in order to harass Dr. Momah, prejudice the fact finder against him and make litigation more expensive failed to show improper purpose); Batten v. Abrams, 28 Wn. App. 737, 748, 626 P.2d 984 (1981)(Court of Appeals stated that "[e]ven if

his claims were groundless, bringing the lawsuit based upon those claims does not establish an ulterior motive" and "[t]he initiation of a vexatious civil proceedings known to be groundless is not abuse of process….").

Given the above, Plaintiffs were required to make a threshold showing to the trial court of an ulterior motive and an act—proof of which, to the extent it actually exists, has not been shown by Plaintiffs to be exclusively within the protected records of the City as required by CR 26(b)(4). As such, the trial court's failure to require Plaintiffs make this showing prior to ordering release of protected information under CR 26(b)(4) was error.

IV. Plaintiffs Fail to Address City Issue No. 2 and City Issue No. 3.

Plaintiffs' Response fails to address City's Issue No. 2 (Assignment of Error No. 5 -Internal Communications are Protected Attorney-Client Privilege) and City Issue No. 3 (Assignment of Error No. 6 - Common Interest Privilege). Opening Br., p. i.

RAP 12.1(a) states: "Except as provided in section (b), the appellate court will decide a case only on the basis of issues set forth by the parties in their briefs." Holder v. City of Vancouver, 136 Wn. App. 104, 107, 147 P.3d 641 (2006)(quoting Seattle First-Nat'l Bank v. Shoreline Concrete Co., 91 Wn.2d 230, 243, 588 P.2d 1308 (1978))("We do 'not consider issues apparently abandoned' at trial and clearly abandoned on appeal.")'; see also, Spice v Lake, No. 82683-2-I, 2022 Wash. App. LEXIS 1125 (Ct. App. May 31, 2022)(Plaintiff abandoned issue of contempt sanctions when he failed to address an element of alleged damages on appeal).[12]

"A party abandons an issue by failing to pursue it on appeal by (1) failing to brief the issue or (2) explicitly abandoning the issue at oral argument." Holder v. City of Vancouver, 136 Wn. App. 104, 107, 147 P.3d 641 (2006). Failure to include argument or cite authority equates to

[12] Unpublished opinion cited in accord with GR 14.1.

abandonment of the issue on appeal. See Talps v. Arreola, 83 Wn.2d 655, 657, 521 P.2d 206(1974).

Given Plaintiffs have not addressed City's Issue No. 2 or City's Issue No. 3, opposition to the City's position on these issues should be deemed abandoned by Plaintiffs and these issues should be resolved on the current record before the Court.

V. Plaintiffs Are Not Entitled to Attorneys' Fees.

Authority cited by Plaintiffs does not support the award of attorneys' fees and costs for this appeal. Initially, attorneys' fees are not recoverable unless "authorized by contract, statute or a recognized ground of equity." Bill of Rights Legal Found. v. Evergreen State Coll., 44 Wn. App. 690, 697 723 P.2d 483 (1986)(citing Mellor v. Chamberlin, 100 Wn.2d 643, 673 P.2d 610 (1983). As such, attorneys' fees are not authorized in this case for three reasons: first, the record contains no evidence of a contract between Plaintiffs and the City; second, there is no statutory authorization for fees for this appeal; and third, there is no equitable basis upon which to award fees. The first reason is

discussed above, the second and third reasons warrant addition discussion.

No statutory authority cited by Plaintiffs allow for attorneys' fees. Initially, RCW 4.84.185 is not applicable. RCW 4.84.185 applies to allow fees for "frivolous claims made at the trial court level and is not a basis for recovery of fees on appeal." Bill of Rights Legal Found. v. Evergreen State Coll., 44 Wn. App. at 697. Even assuming the statute does apply to appeals, the City's issues on appeal are supported by a rational argument on the law and the facts and, therefore, do not meet the definition of "frivolous". Bill of Rights Legal Found. v. Evergreen State Coll., 44 Wn. App. 690, 696-97, 723 P.2d 483 (1986)(citing Bennett v. Passic, 545 F.2d 1260 (10th Cir. 1976)). Finally, RCW 4.84.185 does not apply given the current procedural posture of this case, specifically: the underlying lawsuit has not concluded and the trial court has not made "written findings" that the City's defenses were wholly "frivolous and advanced without reasonable cause", as required by the statute. See Ahmad v.

Town of Springdale, 178 Wn. App. 333, 314 P.3d 729 (2013); In re Cooke, 93 Wn. App. 526, 969 P.2d 127 (1999).

Similarly, RCW 51.32.185 provides no statutory authority for the award of fees for this appeal. RCW 51.32.185 applies to the award of reasonable costs to a party who succeeds on a claim for benefits under Title 51 RCW. Spivey v. City of Bellevue, 187 Wn.2d 716, 389 P.3d 504 (2017); Larson v. City of Bellevue, 188 Wn. App. 857, 355 P.3d 331 (2015); RCW 51.32.185(9).[13] Put another way, the statutory costs anticipated by the statute apply

[13] See RCW 51.32.185(9)(a)("When a determination involving the presumption established in this section is appealed *to the board of industrial insurance appeals and the final decision allows the claim for benefits*, *the board of industrial insurance appeals shall order* that all reasonable costs of the appeal, including attorney fees and witness fees, be paid to the firefighter, fire investigator, or law enforcement officer, or his or her beneficiary by the opposing party.")(Emphasis added); see also, RCW 51.32.185(9)(b) ("When a determination involving the presumption established in this section is appealed to any court and *the final decision allows the claim for benefits*, the court shall order that all reasonable costs of the appeal, including attorney fees and witness fees, be paid to the firefighter, fire investigator, or law enforcement officer, or his or her beneficiary by the opposing party.")(Emphasis added.).

only to the litigation directed at successfully pursuing the Title 51 RCW claims within workers compensation framework, including appeals. RCW 51.32.185 does not provide statutory authorization for award of fees when a worker subsequently sues his employer for secondary claims not authorized under Title 51 RCW.

Plaintiffs also argue that this Court can order attorneys' fees on based on equitable principles discussed in Olympic S.S. Co. v. Centennial Ins. Co., 117 Wn.2d 37, 811 P.2d 673 (1991) and McGreevy v. Or. Mut. Ins. Co., 128 Wn.2d 26, 904 P.2d 731 (1995). However, once again, neither case provides authority for an award of fees and costs to Plaintiffs in this appeal. Both cases involve the award of fees in the context of an *insured* suing an *insurer* to obtain the benefits of their insurance *contract*. As discussed above, there was no insured, no insurer and no insurance contract, rendering Olympic S.S. Co. v. Centennial Ins. Co. and McGreevy v. Or. Mut. Ins. Co. wholly inapplicable.

In summary, there was no contract, no statute and no equitable principle that supports Plaintiffs' request for fees related to this appeal.

VI. Conclusion.

The trial court erred in ordering access to the City's information protected by attorney-client privilege and the work product doctrine. The trial court order abrogates the City's privileges without a legal basis to do so. The trial court did not cite to or rely upon any recognized exception to the privilege—nor did the trial court follow proper procedure in so ordering. Instead, the trial court appears to have premised its order on a CR 26 relevancy analysis-which is not, nor should be, the law.

This document contains 5,306 words, excluding the parts of the document exempted from the word count by RAP 18.17.

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RESPECTFULLY SUBMITTED this 14 day of June, 2022.

WILLIAM FOSBRE, City Attorney

/s/ *Kimberly J. Cox*
KIMBERLY J COX, WSBA #19955
Deputy City Attorney
Attorney for City of Tacoma

I, Kimberly J. Cox, declare under penalty of perjury and pursuant to the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

Signed in Tacoma, Washington on June 14, 2022.

/s/ *Kimberly J. Cox*
KIMBERLY J. COX

CERTIFICATE OF SERVICE

On June 14, 2022, I hereby certify that I electronically filed the foregoing APPELLANT/CROSS-RESPONDENTS' REPLY BRIEF with the Clerk of the Court, which will send notification of such filing to the following:

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EXECUTED this 14th day of June 2022 at Tacoma, WA.

/s/Gisel Castro
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Tacoma City Attorney's Office

CITY OF TACOMA - OFFICE OF THE CITY ATTO

June 14, 2022 - 4:07 PM

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